

Maria S.

**IN THE HIGH COURT OF BOMBAY AT GOA  
CRIMINAL WRIT PETITION NO.56 OF 2023**

Mr Ajju C. S. Sindolli, son of Mr Somnath Somshekar, aged 61 years, married, Indian National, Proprietor of Ajju Mines and Minerals, having registered office at 'Victor Palace', Mezzanine Floor, Opp. Ambedkar Park, Patto, Panaji, Goa-403001. Presently r/o. 491/2, Dhanva Road, Thivim, Bardez, Goa-403502.

**... Petitioner**

*Versus*

Ms. Elizabeth Rodrigues, D/o. Late Mr. Luis Francisco, aged 68 years, married, retired, Indian National, r/o. Flat No.204, Sonata Building, Nr. Science Centre, Miramar, Panaji, Goa.

**...Respondent**

**Mr Eeshan Usapkar, Advocate** *for the Petitioner.*

**Mr Ressano de Noronha, Advocate** *for the Respondent.*

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**CORAM:  
DATED :**

**PRAKASH D. NAIK, J  
16<sup>th</sup> OCTOBER 2023**

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**ORDER:**

1. The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India challenging the order dated 27.02.2023 passed by learned Chief Judicial Magistrate, Panaji, below Exhibit D-31 and D-32.

2. The petitioner is prosecuted for offence under Section 138 of the Negotiable Instruments Act. The complaint was numbered as Case No.OA/854/2018/A. It was filed on 12.12.2018. Vide order dated 14.01.2018, process was issued for offence under Section 138 of Negotiable Instruments Act. The case was then posted for appearance. Case was adjourned due to circulars issued by High Court due to pandemic of Covid-19. Accused was directed to furnish bond on 10.02.2021. Case was adjourned for recording substance of accusation. On 07.11.2022 substance of accusations was explained. Accused pleaded not guilty. The learned Magistrate recorded that since accused have not filed application under Section 145(2), matter to proceed for 313 Statement to 23.11.2022. The petitioner referred application Exhibit D-31 under Section 145(2) of Negotiable Instruments Act and application for reopening the evidence Exhibit D-32. The respondent filed reply to application under Section 145(2) of Negotiable Instruments Act on 04.01.2023. The respondent also filed reply to application for reopening evidence on 14.04.2023. The learned Magistrate rejected application Exhibit D-31 and application Exhibit D-32 vide separate orders dated 27.02.2023.

3. While rejecting the application Exhibit D-31 preferred by the petitioner under Section 145(2) of Cr.P.C. it was observed that the case is fixed for recording the statement of the accused under Section 313 of Cr.P.C. The order dated 07.11.2022 was not challenged by the accused, hence, application is not maintainable. The application Exhibit D-32 was rejected on the ground that accused did not file application under Section 145 of the Negotiable Instruments Act and hence, the case was kept for explaining statement under Section 313 of Cr.P.C. This fact is evident from the roznama dated 07.11.2022. The said order was not challenged by the accused. Reopening of the evidence of the complainant solely for the purpose of facilitating the accused in filing application under Section 145 of the Negotiable Instruments Act would amount to review of the earlier order. No power of review has been conferred by the Code on criminal court and it cannot review the order passed or judgment pronounced.

4. Learned advocate for the petitioner submitted that three cheques were issued by the accused to the complainant. Petitioner volunteered to deposit the amount of Rs.3lakhs before this Court. The said fact is recorded in order dated 27.07.2023.

The petitioner deposited an amount of Rs.3lakhs by Demand Draft before the trial Court. The petitioner must be given an opportunity to cross-examine the complainant. The learned Magistrate abruptly closed the evidence and posted the case for recording statement under Section 313 of Cr.P.C. The petitioner had appeared before the trial Court on 03.12.2021. The trial Court ought to have re-opened the case for the purpose of cross-examination of the complainant.

5. Learned advocate for respondent submitted that the petitioner is a chronic defaulter. He did not reply the notice. The petitioner has been delaying the case. The affidavit of evidence was filed by the complainant on 11.12.2018. The application under Section 145(2) of the Negotiable Instruments Act was filed on 23.11.2022. The proceedings under Section 138 of the Negotiable Instruments Act are required to be disposed of expeditiously. Roznama indicates that the accused did not appear before the trial Court and protracted the trial. Process was issued against the accused on 14.01.2018. With hard efforts the complainant could execute the process against the accused and, thereafter, he appeared before the Court after long period of two years. Proceedings were adjourned on account of Covid-

19 and the circulars issued in that regard. The case was taken up on 13.01.2021. The petitioner had filed application for cross-examination. The learned Magistrate has rightly rejected the application. The petitioner did not challenge the order closing the evidence. Since accused did not file application under Section 145 of the Negotiable Instruments Act, the trial Court had posted the matter for recording the statement under Section 313 Cr.P.C.

6. Vide order dated 27.07.2023, it was recorded that, there are three cheques issued at the instance of accused. Two cheques of Rs.1,50,000/- each were issued in discharge of liability. The third cheque was a replacement against one of the cheque. The petitioner volunteered to deposit Rs.3 lakhs before the trial Court.

7. On 07.11.2022 substance of accusation was explained to the accused. The accused pleaded not guilty. On the same day the learned Magistrate recorded that the accused did not file application under Section 145(2) of the Negotiable Instruments Act and hence, matter to proceed for 313 Statement. The case was adjourned to 23.11.2022. On the next date, the petitioner

filed an application seeking permission to cross-examine the complainant under Section 145(2) of Negotiable Instruments Act and for re-opening the case. Both applications were rejected.

8. The petitioner is required to rebut the presumption under Section 139 of the Negotiable Instruments Act. Immediately after the order dated 07.11.2022, the petitioner preferred the application Exhibit D-31 and D-32. The application under Section 145(2) of Negotiable Instruments Act was rejected on the ground that order dated 07.11.2022 is not challenged and it has attained finality. Whereas, the application for reopening case was rejected on the ground that review of earlier order is not permissible.

9. In the case of ***Rakesh Singh vs. Anil Madanmohan Gulati & anr<sup>1</sup>***, this Court has dealt with the issue relating to application under Section 145(2) of the N. I. Act. Reference was made to several decisions of the Apex Court as well as this Court. It was observed that it may be that the accused has an opportunity to lead defence evidence and rebut presumption, if any. However, that does not mean that the valuable right of the

accused to cross-examine the Complainant which he is entitled under Section 145(2) of the N.I. Act, can be lightly brushed aside. It was also observed that the accused has a right to fair trial. Once it is recognised that the accused has absolute and unqualified right to have the complainant and any or all of his witnesses summoned for cross-examination, the applicant cannot be deprived of such a right. The Supreme Court in ***Meters and Instruments Private Limited & anr. vs. Kanchan Mehta***<sup>2</sup>, the Supreme Court has not at all diluted the proposition laid down in ***Mandvi Co-op Bank Ltd. vs. Nimesh B. Thakore***<sup>3</sup>, that the accused is fully protected and under sub-section (2) of Section 145 of the N. I. Act, he has absolute and unqualified right to have the Complainant and any or all of his witnesses summoned for cross-examination. The Supreme Court has not curtailed the right of the accused to have the Complainant summoned for cross-examination.

10. In the case of ***Mandvi Co-op Bank Ltd. vs. Nimesh B. Thakore*** (supra), the Supreme Court had considered the scope of Section 145 of the N. I. Act. It was observed that the accused is fully protected as under sub -section (2) of Section

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<sup>2</sup> (2018) 1 SCC 560

<sup>3</sup> (2010) 3 SCC 83

145, he has absolute and unqualified right to have the complainant and any or all of his witnesses summoned for cross examination. The affidavit of the person summoned is in nature of examination in chief, hence on being summoned on the application made by the accused, the deponent of the affidavit, the Complainant or any of his witnesses can only be subjected to cross-examination as to the facts stated in the affidavit.

11. In ***Meters and Instruments Private Limited & anr. vs. Kanchan Mehta*** (supra), the Supreme Court was considering the issue as regards the rejection of the prayer by the High Court for compounding offence under Section 138 of N.I. Act on payment of cheque amount. How proceedings can be regulated, where the accused is willing to deposit the cheque amount and whether proceedings can be closed. In the context of issues under consideration, it was observed that the accused who wants to contest the case, must be required to disclose specific defence for such contest. It is open to the Court to ask specific questions to the accused at that stage.

12. In the light of observation of Supreme Court in the case of ***Mandvi Co-op Bank Ltd. vs. Nimesh B. Thakore*** (supra),

the accused is protected under Section 145(2) of N. I. Act to have Complainant and his witnesses cross-examined.

**ORDER**

- (i) Writ Petition is allowed.
- (ii) Impugned orders dated 27.02.2023 passed by the learned Chief Judicial Magistrate North Goa at Panaji below Exhibit D-31 and D-32 in Criminal Case No.OA/854/2018/A are quashed and set aside.
- (iii) The evidence is reopened. The petitioner is permitted to cross-examine complainant in accordance with Section 145(2) of the Negotiable Instruments Act.
- (iv) The petitioner shall not delay the trial.
- (v) The petitioner shall conduct the cross-examination of the complainant immediately.
- (vi) The petitioner shall pay cost of Rs.10,000/- to the complainant within a period of two weeks from the date of uploading this order.
- (vi) Criminal Writ Petition stands disposed of.

**(PRAKASH D. NAIK, J.**

MARIA SUZANA REBELLO Digitally signed by MARIA SUZANA REBELLO  
Date: 2023.10.21 18:30:07 +05'30'